

THE UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21

CONSTRUCTION MACHINERY, INC.

Employer

and

Case 21-RC-20306

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 12, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**All full-time and regular part-time employees, including plant clerical employees, employed in the Employer's Parts and Service department at the Employer's facility, located at 22099 Knabe Road, Corona, California; excluding all other employees, outside equipment sales employees and outside parts sales employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.<sup>1</sup>**

The Petitioner contends that Thomas Toth, herein called Toth, is a supervisor as defined in the Act and that he should therefore, be excluded from the unit. The Petitioner also contends that Alma Riddell, herein called Riddell, and Susan Lipert, herein called Lipert, are office clerical employees and should also be excluded from the unit. The Employer argues that Toth is not a supervisor as defined in the Act and that Riddell and Lipert are plant clerical employees who share a community of interest with employees in the appropriate unit and who should therefore, be included in the unit.

The Employer, which has its headquarters in Alaska, is engaged in the business of selling, renting and servicing construction equipment. It operates approximately 15 branches located in Alaska, Nevada and California. The branch at issue in the present case is located at 22029 Knabe Road, Corona, California, herein called "the Facility," where approximately 35 employees are employed, including 18 parts and service employees. The Facility operates out of a two-story building. The first story is comprised of the parts and service departments, which include the parts warehouse and the shop area. The second floor of the building is comprised of the sales department, which includes equipment sales persons, product support representatives and the office manager's office. The vice president of the Southern California operations is Bob Gerondale, who also works primarily in the Facility.

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<sup>1</sup> The unit description appears as stipulated by the parties.

According to the record, Toth has been employed at the Facility for approximately 6 or 7 years. Toth has held the positions of shop mechanic, field mechanic and is currently employed as the shop foreman<sup>2</sup>. His job duties as a shop foreman include coordinating service technicians on the shop floor and in the field. He works out of an office located on the first floor and is paid on an hourly basis<sup>3</sup>.

The record discloses that in December 2000, George Baker, herein called Baker, the service manager at the Facility, resigned his position with the Employer. Since Baker's departure, Toth has temporarily assumed a number of the service manager's responsibilities. In this regard, the record reflects that while acting in the service manager's capacity, Toth has exercised independent judgment in creating work schedules for the service employees, assigning work to employees, approving vacation and leave time, approving and assigning overtime work, participating in employee appraisals, recommending discipline, signing the employee's payroll time sheets and approving work orders. He has also approved requests by employees to attend discretionary technical certification courses. According to the record, since December 2000, Toth has also participated in interviewing prospective job applicants and has made recommendations as to the applicants' skills and how they would get along working in the shop. The record does not disclose whether Toth received any pay increase in connection with the assumption of these additional duties.

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<sup>2</sup> The record discloses that Toth's business card lists his title as Field Service Supervisor. The Employer's vice president of Southern California operations, Robert Gerondale, herein called Gerondale, testified that the Employer never approved this title and disavows any knowledge of the printing of this business card. There is no evidence on record as to the creation of this card or whether it was obtained with the Employer's knowledge or consent. Gerondale testified that Toth's title, according to the Employer's Human Resources department records, is "shop foreman." Toth did not testify at the hearing.

<sup>3</sup> The record does not disclose Toth's pay rate in relation to other employees in the unit or supervisors employed by the Employer.

Riddell<sup>4</sup> is employed as a service clerk for the service and parts department at the Facility. Riddell's office is located on the first floor adjacent to and within the same area as Toth's office. Riddell is paid on an hourly basis and enjoys the same benefits as the other employees in the service and parts departments. The majority of Riddell's work is performed at a computer in her office. She spends approximately 2 to 4 hours of her day dealing directly with service employees. Some of her personal contact with the service and parts employees includes coordinating service reports, timecard preparation, issuing purchase orders, delivering requisition slips to the parts department, and attending safety meetings with the service and parts employees. Riddell is responsible for opening work orders for the service employees and maintaining a work order log, which lists outstanding service orders. She also delivers parts requisition forms to the parts department. The record also reflects that Riddell has had the occasion to assign work to service employees in the absence of shop foreman/acting service manager Toth. Riddell works under the direct supervision of the service manager. Because of the vacancy of that position, she is presently being supervised by the vice president of Southern California operations, Robert Gerondale.

Lipert<sup>5</sup> is employed as the Employer's rental administrator. Her office is located on the second floor along with the sales department. Like Riddell, Lipert is an hourly employee<sup>6</sup> and shares the same employee benefits as the other employees in the unit. Her duties include taking customers' orders for equipment, inspecting the equipment in the yard, coordinating equipment being leased and routing equipment service forms to the service employees. She generates the "Machine Movement Report," which prompts work performed by the service employees and inspects equipment to insure its "rent-ready" condition. The routing of the several forms from Lipert to the service department, and vice versa, is done through acting service manager/shop

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<sup>4</sup> Riddell did not testify at the hearing.

<sup>5</sup> Lipert did not testify at the hearing.

<sup>6</sup> The record does not disclose Riddell's or Lipert's hourly pay rate.

foreman Toth, through mailboxes located on the first floor, or through direct interaction with the service employees. Lipert is also responsible for the equipment and machine inventory, which she conducts in the downstairs yard. Lipert is responsible for the documentation of 60 to 65 percent of the work performed by the service employees. In performing her duties, Lipert spends approximately 20 to 40 percent of her time in the first floor shop area. However, the record is silent on the percentage of time she spends interacting with the service employees. Her immediate supervisor is Sales Manager Tom Case.

As noted above, it is the Petitioner's contention that Toth is a supervisor as defined in the Act and that he should therefore be excluded from any appropriate unit. The Petitioner also contends that Riddell and Lipert are office clerical employees properly excluded from the unit. The Employer argues that Toth is not a supervisor as defined in the Act and, that to the extent he has undertaken any additional supervisory responsibilities, he has done so only on a temporary basis. The Employer further argues that Riddell and Lipert are plant clerical employees that share a community of interest with the unit employees and should therefore, be included in the unit.

In support of its argument, the Employer introduced into the record stipulated election agreements and evidence as to history of collective bargaining at the Employer's facilities located in Sacramento and Livermore where the parties included the rental administrator, the service clerks and shop foreman in the units. The Employer seeks to introduce this history of collective bargaining at other plants operated by the Employer as evidence of a "community of interest" between Toth, Riddell, Lipert, and the appropriate unit in the present case. In this regard, the Board has concluded that the bargaining patterns at other plants of the same employer or in the particular industry will not be considered controlling in relation to the bargaining unit of a particular plant. Big Y Foods, 238 NLRB 855 (1978); Miller & Miller Motor Freight, 101 NLRB 581 (1953). Accordingly, the Employer's reliance on

this evidence is rejected. History of collective bargaining at other facilities does not serve, by itself, to establish a community of interest among the employees in the present case. Such determination must be based on the record as presented herein, dealing with the terms and conditions of the employees at the Facility.

In regards to Toth, Section 2(11) of the Act defines supervisors as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status.

Chicago Metallic Corp.,

273 NLRB 1677, 1689 (1985). Consistent with the statutory language and the legislative intent of Section 2(11), however, it is well recognized that the disjunctive listing of supervisory indicia does not alter the requirement that a supervisor must exercise independent judgment in performing the enumerated functions. Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. Opelika Foundry, 281 NLRB 897, 899 (1986). The burden of proving supervisory status rests on the party alleging that such status exists. Tucson Gas & Electric Co., 241 NLRB 181 (1979). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co., 308 NLRB 101, 102

(1992). Here, the burden rests on the Petitioner to show that Toth is a supervisor as defined in the Act.

In previous cases, the Board has found that where an employee completely takes over the supervisory duties of another, he is regarded as a supervisor under the Act. Birmingham Fabricating Co., 140 NLRB 640 (1963). However, isolated supervisory substitution does not warrant a supervisory finding. Latas de Alumino Reynolds, 276 NLRB 1313 (1985); St. Francis Medical Center-West, 323 NLRB 1046 (1997). In the present case, the record reflects that for approximately 2 ½ months, Toth has been performing some supervisory duties in the absence of a service manager. For instance, he has interviewed and effectively recommended for hire two job applicants hired by the Employer, created work schedules, approved vacation and leave time, approved and assigned overtime work, participated in employee appraisals, recommended discipline, and signed the employees' payroll time sheets. The record discloses testimony by Gerondale, however, that these additional responsibilities assumed by Toth are only temporary and that the Employer has employment agencies looking for candidates. Gerondale testified that the Employer will fill that position as soon as possible and that Toth is not being considered as a permanent replacement for that position. The Employer's contention is consistent with the fact the Toth continues to be paid on an hourly basis, receives the same benefits, punches the same time clock and is evaluated in the same manner as other employees in the unit. The Petitioner argues that Toth's business card introduced into the record is evidence of Toth's permanent status as a service supervisor. However, this evidence is inconclusive because no evidence was presented regarding the creation of this business card or refuting the Employer's contention that this card was created without its knowledge or consent.

Based on the short period of time Toth has assumed the additional supervisory responsibilities, as well as the lack of evidence disputing the Employer's contention that Toth has assumed these duties only on a temporary

basis, I find that the Petitioner has not met its burden so as to demonstrate that Toth is a supervisor under the Act. Accordingly, Toth shall be included in the appropriate bargaining unit.

The Petitioner also seeks to exclude Riddell and Lipert as office clerical employees. The Board customarily excludes office clerical employees from units of production and maintenance employees, while plant clerical employees are generally included in such units. Hygeia Coca-Cola Bottling Co., 192 NLRB 1127 (1971); Westinghouse Electric Corp., 118 NLRB 1043 (1957); Raytec Co., 228 NLRB 646 (1977). The distinction between office clerical employees and plant clerical employees, however, is not always a clear one because the disputed employees often appear to share characteristics of both groups in the duties they perform and in their working conditions. A controlling factor in making this distinction is whether the disputed clerical employees perform work that is directly related to, and integrated with, the functional operation of the facility and the duties performed by other unit employees. Ives Business Forms, Inc., 263 NLRB 286, 289 (1982). In making this determination, the Board looks at factors such as whether the clericals have regular contact with unit employees; work in an area adjacent to unit employees; and share common wages, immediate supervision, working conditions, and fringe benefits with unit employees. American Parts System, Inc., 254 NLRB 901, 902 (1981). If such factors are present, the clericals are considered to be plant clericals. Jacob Ash Co., 224 NLRB 74, 75 (1976). If, however, the disputed employees have separate and distinct functions from unit employees; are separately supervised; physically separated; have minimal contact with unit employees; and limited transfer or interchange with unit employees, the clericals are found to be office clericals and excluded from the unit. Ives Business Forms, Inc., supra.

In the present case, the record discloses that both Riddell and Lipert perform duties consistent with those of plant clerical employees. Riddell's and Lipert's job functions are directly related to, and integrated with, the



functional operations of the Facility and the unit employees. Furthermore, Riddell and Lipert, as the service clerk and rental administrator, respectively, have regular contact with unit employees; perform work in an area adjacent to unit employees; are paid on an hourly basis; and share similar working conditions and fringe benefits with unit employees. The Petitioner contends that Lipert's job functions are consistent with those of an office clerical employee because her office is located in the sales department, because she is under the direct supervision of the Sales Manager Tom Case and because she has little, if any, actual contact with the unit employees. While the record does not dispute the location of Lipert's office or her direct supervision, the record does disclose that Lipert is responsible for the documentation of 60 to 65 percent of the work performed by the service employees and that she spends approximately 20 to 40 percent of her time in the first floor shop area. In addition, contrary to the Petitioner's contention, the record reflects that the work performed by Lipert is directly related to, and integrated with, the functional operation of the unit employees.

Based on the above-noted considerations and the record as a whole, it is concluded that Riddell and Lipert share a community of interest with the parts and service employees and therefore, should be included in the appropriate bargaining unit. Brown & Root, Inc., 314 NLRB 19, 24 (1994); Sohio Natural Resources, 237 NLRB 1261, 1262 (1978).

There are approximately 18 employees in the unit.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they

were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12, AFL-CIO**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters in the unit and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, Ninth Floor, Los Angeles, California 90017, on or before March 15, 2001. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

#### NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 22, 2001.

DATED at Los Angeles, California, this 8th day of March, 2001.

/s/Victoria E. Aguayo  
Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations Board

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